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OFFICE OF PETITIONS

In re Application of
Kenneth E. Persson
Application No. 10/727,463
Filing Date: December 4, 2003
Attorney Docket No. KP-004
Title: SIDE ACTING EXTRACTOR TOOL

DECISION ON PETITION

This is a decision on the petition filed November 15, 2004, requesting that the above-identified application be accorded a filing date of December 4, 2003, with Figures 9C, 10C, and 13B as part of the original disclosure of the application.

The application was deposited December 4, 2003. However, on September 17, 2004, the Office of Initial Patent Examination (OIPE) mailed a notice stating that the application had been accorded a filing date of December 4, 2003, and that the application appeared to have been deposited without Figures 9C, 10C, and 13B.

With the instant petition, Petitioner has submitted a copy of Figures 8, 9A-C, 10A-C, 11, 13B, and 14, along with the petition fee.

With the petition, Petitioner sets forth that Figures 9C, 10C, and 13B were included on filing.

Section 503 of the MPEP, entitled Application Number and Filing Receipt, sets forth, in part:

RETURN POSTCARD

If a receipt of any item (e.g., paper or fee) filed in the USPTO is desired, it may be obtained by enclosing with the paper a self-addressed postcard specifically identifying the item. The USPTO will stamp the receipt date on the postcard and place it in the outgoing mail. A postcard receipt which itemizes and properly identifies the items which are being filed serves as prima facie evidence of receipt in the USPTO of all the items listed thereon on the date stamped thereon by the USPTO.

The identifying data on the postcard should be so complete as to clearly identify the item for which receipt is requested. For example, the postcard should identify the applicant's name, application number (if

known), confirmation number (if known), filing date, interference number, title of the invention, etc. The postcard should also identify the type of paper being filed, e.g., new application, affidavit, amendment, notice of appeal, appeal brief, drawings, fees, motions, supplemental oath or declaration, petition, etc., and the number of pages being submitted. If a new application is being filed, all parts of the application being submitted should be separately listed on the postcard, e.g., the number of pages of specification (including written description, claims and abstract), number of claims, number of sheets of drawings, number of pages of oath/declaration, number of pages of cover sheet (provisional application).

The postcard receipt will not serve as prima facie evidence of receipt of any item which is not adequately itemized on the postcard. For example, merely listing on the postcard "a complete application" or "patent application" will not serve as a proper receipt for each of the required components of an application (e.g., specification (including claims), drawings (if necessary), oath or declaration and the application filing fee) or missing portions (e.g., pages, sheets of drawings) of an application if one of the components or portion of a component is found to be missing by the USPTO. Each separate component should be specifically and properly itemized on the postcard. Furthermore, merely incorporating by reference in the postcard receipt, the items listed in a transmittal letter will not serve as prima facie evidence of receipt of those items.

The person receiving the item(s) in the USPTO will check the listing on the postcard against the item(s) being filed to be sure they are properly identified and that all the items listed on the postcard are presently being submitted to the USPTO. If any of the items listed on the postcard are not being submitted to the USPTO, those items will be crossed off and the postcard initialed by the person receiving the items.

Upon return of a postcard receipt from the USPTO, the postcard receipt should be promptly reviewed by the person who filed the items to ensure that every item specifically denoted on the postcard was received by the USPTO. If the postcard receipt has been annotated to indicate that a particular item denoted on the postcard was not received by the USPTO, the postcard receipt will not serve as prima facie evidence of receipt of that item in the USPTO.

It is noted that the electronic file contains 14 pages of drawings, containing Figures 1-2, 3A-B, 4-8, 9A-B, 10A-B, 11A-D, 12A-B, 13, 14A-C, and 15-35. Each of the pages of the drawings containing the header "X/14," with X being 1-14. Page 3/14 contains Figures 5-8. Page 4/14 contains Figures 9A-9B and 10A-10B. Page 6/14 contains Figures 12A-B, 13, and 14A-C.

With the instant petition, Petitioner has submitted three sheets of drawings which contain the headers 3/17, 4/17, and 6/17. Page 3/17 contains Figures 8 and 9A-C. Page 4/17 contains Figures 10A-C and 11. Page 6/14 contains Figures 13B and 14.

Not only does the pagination differ, but both the figures themselves and the figures which appear on pages 3, 4, and 6 differ. Due to the differing pagination and the differing figures between what was submitted on filing and what was submitted with this petition, it is clear that these subsequently submitted pages were not included on filing. The drawings which were submitted on filing contained the pagination "X/14," and 14 consecutively numbered pages were received. As such, it appears that 14 pages were filed, and 14 pages were received. It does not appear that Petitioner included Figures 9C, 10C, and 13B on filing.

Furthermore, each of the drawings submitted with this petition differ from that which was submitted on filing. It appears that Petitioner is attempting to replace the previously filed drawings with these new ones.

The PTO file is the official record of all papers filed in this application. As stated previously, a review of the official file reveals that 14 pages of drawings were received on filing. An applicant alleging that a paper was filed in the Office and later misplaced has the burden of proving the allegation by a preponderance of the evidence. Petitioner has supplied a postcard receipt which states "drawings (17 pages)" and bears a date stamp from OIPE which reads "120403." It is acknowledged that a postcard receipt which itemizes and properly identifies the papers which are being filed serves as prima facie evidence of receipt in the PTO of all the items listed thereon on

the date stamped thereon by the PTO¹. It is further noted that Petitioner's Utility Patent Application Transmittal sheet states that 17 pages of drawings were included.

"Prima facie evidence" is defined as evidence such that is sufficient to establish a given fact, and if not rebutted or contradicted, will remain sufficient². As such, if the evidence is rebutted, the same is no longer sufficient. The information on the postcard is clearly contradicted by the pagination which Petitioner himself placed on the drawings submitted on filing. Although the postcard Petitioner has supplied indicates that 17 pages were received on December 4, 2003, the electronic file contains 14 consecutively numbered pages which contain a pagination which makes it clear that only 14 pages were submitted. It is clear that these pages were not supplied on filing.

For these reasons, the petition cannot be granted. The petition is **DISMISSED**.

The figures submitted with the instant petition, will not be entered.

Any renewed petition must be submitted within **TWO (2) MONTHS** from the mail date of this decision. Extensions of time under 37 CFR 1.136(a) are permitted. The renewed petition should include a cover letter entitled "Renewed Petition under 37 CFR 1.182."

The reply to this letter may be submitted by mail³, hand-delivery⁴, or facsimile⁵.

The reply should display "Please deliver to Paul Shanowski, c/o Office of Petitions" in a prominent manner. The Petitioner may wish to consider telephoning the undersigned at the number provided below to confirm that the documents were delivered to the undersigned. Please note that the delivery process within the PTO can take as much as three weeks.

The application file will be retained in the Office of Petitions for two (2) months.

The general phone number for the Office of Petitions which should be used for status requests is (571) 272-3282. Telephone inquiries regarding *this decision* should be directed to the undersigned at (571) 272-3225.



Paul Shanowski
Senior Attorney
Office of Petitions
United States Patent and Trademark Office

¹ See MPEP 503, partially reproduced above.

² See Black's Law Dictionary 1190 (6th ed. 1990).

³ Mail Stop Petition, Commissioner for Patents, United States Patent and Trademark Office, P.O. Box 1450, Alexandria, VA, 22313-1450.

⁴ Customer Window, Mail Stop Petition, Crystal Plaza Two, Lobby, Room 1B03, Arlington, Virginia 22202.

⁵ (703) 872-9306 - please note this is a central facsimile number, and as such, there will be a delay in the delivery of the facsimile to the undersigned.